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Smart Move: Argentina to Leave the ICSID

by Oscar Lopez*

I. INTRODUCTION

Due to the large number of claims that Argentina faces from international investors before the International Centre for Settlement of Investment Disputes, the country has begun working towards leaving the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.¹ Argentina's move is controversial, and some commentators have noted that withdrawal could mean missing out on some significant benefits from the Convention.²

This essay, however, argues that Argentina is making the right move by beginning the process of withdrawing from the Convention. Section two describes the history of the Centre and Argentina's interactions with it. Section three analyzes Argentina's problems with the Centre. Section four discusses current alternatives and the likely effect of withdrawal. Section five presents a conclusion.

II. BACKGROUND

The International Centre for Settlement of Investment Disputes

Foreign investors have traditionally faced bias when litigating against a country in its domestic courts. In order to protect foreign investors, in 1965 the World Bank formulated the Convention on the Settlement of Investment Disputes

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¹ See *Argentina in the Process of Quitting From World Bank Investment Disputes Centre*, MERCOPRESS (Jan. 31, 2013), <http://en.mercopress.com/2013/01/31/argentina-in-the-process-of-quitting-from-world-bank-investment-disputes-centre>.

² See, e.g., Michael Robinson, *Speaker's Corner: ICSID Critics Misguided as Investment Treaties Deliver Significant Benefits*, LAW TIMES (Dec. 30, 2013), <http://www.lawtimesnews.com/201312303675/commentary/speaker-s-corner-icsid-critics-misguided-as-investment-treaties-deliver-significant-benefits>.

between States and Nationals of Other States (SID Convention).³ The SID Convention's main goal was to offer "facilities for conciliation and arbitration of investment disputes" between signatory states and nationals of other contracting states.⁴ The Convention accomplished this by creating the International Centre for Settlement of Investment Disputes (ICSID), which provides an impartial forum for arbitration of international investment disputes.⁵ Today, the ICSID is one of the premier international arbitration venues, with over one hundred forty member states.⁶

Foreign Investment in Argentina

Throughout the 1990s, Argentine President Carlos Menem pursued an all-out effort to bring foreign investment to Argentina.⁷ President Menem was successful and signed fifty-five bilateral investment treaties⁸ that brought millions of dollars to the country.⁹ During that time, Argentina also became a signatory to the SID Convention.¹⁰ However, in 2001 the Argentine economy collapsed, severely affecting all the investments in the country.¹¹ Foreign investors promptly filed claims against Argentina at the ICSID.¹² Since then, Argentina has faced forty-three claims that amount to approximately \$65 billion in damages. The ICSID has so far awarded claimants over \$400 million.¹³

III. ARGENTINA'S PROBLEMS WITH THE ICSID

In light of the number of claims Argentina has faced before the ICSID, Argentine policy-makers have considered whether continued adherence to the SID Convention is worth it. As it turns out, there are a number of problems with

³ See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 575 UNTS 159, *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [hereinafter ICSID Convention].

⁴ See *id.* at 5.

⁵ See *id.*

⁶ *About ICSID*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, https://icsid.worldbank.org/ICSID/ICSID/AboutICSID_Home.jsp (last visited Jan. 6, 2014).

⁷ See *Come and Get Me*, ECONOMIST (Feb. 18, 2012), <http://www.economist.com/node/21547836>.

⁸ Cecilia Maria Minaverry, *El arbitraje internacional como mecanismo de solucion de disputas: El caso argentino en el Ciadi 3*, BECA PRESIDENTE NESTOR KIRCHNER, *available at* <http://www.becanestorkirchner.org/papers/Paper%20Final%20-%20Cecilia%20Minaverry.pdf>.

⁹ See *Come and Get Me*, *supra* note 7.

¹⁰ See *List of Contracting States and Other Signatories of the Convention*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (Nov. 1, 2013), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>.

¹¹ See *Come and Get Me*, *supra* note 7.

¹² See *id.*

¹³ See *id.*

the ICSID that likely make it in Argentina's best interest to denounce the SID Convention and leave the ICSID.

The first problem is that the ICSID's arbitrators have rendered inconsistent decisions on what types of actions are necessary for maintaining public order. In *LG&E Energy Corp. et al. v. Argentine Republic*,¹⁴ the tribunal found that Argentina's actions in response to the Argentine Crisis of 2001 fell under Article XI of the bilateral investment treaty with the United States.¹⁵ Article XI exempts a state party from payment in instances where the country's actions were necessary to preserve the public order.¹⁶ Similarly, in *Continental Casualty Company v. Argentine Republic*, the tribunal again found that Argentina's actions fell under the exemption of Article XI.¹⁷

However, ICSID arbitrators have also come to the exact opposite conclusion in *Sempra Energy International v. Argentine Republic*¹⁸ and *Enron Corporation v. Argentine Republic*,¹⁹ where Argentina again claimed the necessity exemption for actions it took during its 2001 financial crisis. Argentina argued in *Sempra* and *Enron* that the state should be the sole judge of when the necessary conditions arise, as long as the state acts in good faith.²⁰ However, the ICSID tribunals disagreed, saying that if the parties intended to allow for self-interpretation, they would have expressly stated that intention in the treaty.²¹ Moreover, a self-judging interpretation would deprive the necessity exemption of any substantive meaning.²²

The ICSID tribunals' decisions in *Sempra* and *Enron* are problematic for two reasons. First, the decisions undermine Argentina's sovereignty because they keep the country from deciding for itself what actions are necessary to preserve the

¹⁴ *LG&E Energy Corp. et al. v. Arg. Republic*, ICSID Case No. ARB/02/1, Certified Award, 1 (July 25, 2007), <http://italaw.com/documents/LGEEEnglish.pdf>.

¹⁵ *See id.* at ¶ 2.

¹⁶ *See* Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Oct. 20, 1994, article XI, S. TREATY DOC. NO. 103-2. ("This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.")

¹⁷ *See Cont'l Cas. Co. v. Arg. Republic*, ICSID Case No. ARB/03/9, Certified Award, ¶ 173 (Sept. 5, 2008), <http://www.italaw.com/sites/default/files/case-documents/ita0228.pdf>.

¹⁸ *See Sempra Energy Int'l v. Arg. Republic*, ICSID Case No. ARB/02/16, Certified Award, ¶ 388 (Sept. 28, 2007), <http://www.italaw.com/sites/default/files/case-documents/ita0770.pdf>.

¹⁹ *See Enron Corp. v. Arg. Republic*, ICSID Case No. ARB/01/3, Certified Award, ¶¶ 331-39 (May 22, 2007), <http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf>.

²⁰ *See Sempra*, ICSID Case No. ARB/02/16, ¶ 368; *Enron*, ICSID Case No. ARB/01/3, ¶ 291.

²¹ *See Sempra*, ICSID Case No. ARB/02/16, ¶ 373-74; *Enron*, ICSID Case No. ARB/01/3, ¶ 333-32.

²² *See id.*; *Sempra*, ICSID Case No. ARB/02/16, ¶ 373-74.

public order.²³ Second, the decisions leave the Argentine government with unclear guidance on what actions it can take during times of economic crisis.

Another reason to leave the SID Conference is that the ICSID forum has potential problems regarding conflicts of interest. At the ICSID, there is no rule barring arbitrators from continuing to practice as attorneys.²⁴ Thus, arbitrators may sit as tribunal judges one day and as lawyers the next. This means arbitrators may be in a position to make decisions that will aid their partners in another case or their clients or cohorts in a future situation.²⁵ Indeed, Argentina has just recently challenged the appointment of an arbitrator because he had links to the law firm that represents Repsol Oil, the plaintiff in an important case against the country.²⁶

Potential conflicts of interest have also arisen in other contexts. In *EDF International S.A. v. Argentine Republic*, for example, one of the tribunal's arbitrators, Professor Kaufmann-Kohler, was also a director of UBS Bank, which shared a financial interest with one of the plaintiffs.²⁷ Argentina argued there was a conflict of interest and that Kaufmann-Kohler should be removed. However, the reviewing tribunal rejected this claim, reasoning that Professor Kaufmann-Kohler's work with UBS was only for corporate governance matters.²⁸ Thus, her bias could only be minimal, and there was nothing inherently suspect about her participation as an arbitrator.²⁹

Finally, the ICSID is problematic because the SID Convention may conflict with Argentina's constitution. Some have argued that Argentina's courts must review the ICSID's judgments to avoid discriminating against domestic investors, who do not have access to the ICSID venue.³⁰ Because this discrimination would

²³ *See id.*

²⁴ *See* HOWARD MANN, AARON COSBEY, LUKE PETERSON & KONRAD VON MOLTKE, COMMENTS ON ICSID DISCUSSION PAPER, "POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION", INT'L INST. FOR SUSTAINABLE DEV. 110–11 (Dec. 2004), *available at* http://www.iisd.org/pdf/2004/investment_icsid_response.pdf ("Lawyers or their partners [should not] sit as a judge one day and as an advocate on a similar issue another day. . . . Yet, this is precisely what happens today in the international arbitration bar.").

²⁵ *See id.*

²⁶ *Argentina Challenges ICSID Judges in the Dispute with Repsol Over YPF Seizure*, MERCOPRESS (Aug. 20, 2013, 1:42PM), <http://en.mercopress.com/2013/08/20/argentina-challenges-icsid-judges-in-the-dispute-with-repsol-over-ypf-seizure>.

²⁷ *See EDF Int'l et al. v. Arg. Republic*, ICSID Case No. ARB/03/23, Challenge Decision Regarding Professor Gabrielle Kaufmann-Kohler, ¶ 12 (June 25, 2008), <http://italaw.com/sites/default/files/case-documents/ita0262.pdf> at 5.

²⁸ *See id.* ¶ 134.

²⁹ *See id.* at ¶¶ 97–134.

³⁰ *See* Katia Fach Gomez, Latin America and ICSID: David versus Goliath? 9–10 (Nov. 12, 2010) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1708325.

violate the Argentine Constitution's principle of equality, the SID Convention may not be constitutional unless ICSID judgments go through the judicial review of Argentina's courts.³¹ However, Article 54 of the Convention states that every award by the ICSID's arbitrators is binding and should be treated as an award by the courts of the contracting parties.³² Thus, Argentina's continued adherence to the SID Convention presents a potential constitutional problem.

Considering these issues, withdrawing from the SID convention could be a good option for Argentina. And if Argentina does so, it will be in good company. The first Latin American country to denounce the Convention was Bolivia in November 2007, followed by Ecuador in 2009, and Venezuela in 2012.³³ Additionally, several Latin American countries, including Mexico and Brazil, have ignored the Convention altogether because it did not align with their interests.³⁴

Why have these countries withdrawn? The increasing use of the ICSID against Latin American countries has been the driving force behind the withdrawals from the SID Convention. Even though relatively few Latin American countries are signatories to the SID Convention, Latin America comprises the largest percentage of cases completed and pending before the ICSID.³⁵ As of May 2013, Latin American countries were parties in 81 out of 262 cases concluded (approximately 31%).³⁶ Furthermore, of the 167 cases still pending, 73 of them were against Latin American countries (approximately 44%).³⁷ Latin American countries also complain that the ICSID is costly and complex, lacks neutrality, and has no effective appeals process.³⁸

³¹ See *id.* at 10; see also Alvaro Torriglia, Horacio Rosatti: "La política de servicios públicos de un país no se puede dirimir en el Ciadi", LA CAPITAL (Feb. 6, 2005), http://archivo.lacapital.com.ar/2005/02/06/economia/noticia_169607.shtml.

³² See ICSID Convention, *supra* note 3, at 27.

³³ See Clifford J. Hendel & Alicia Sanchez, *Latinoamerica y CIADI: Hacia la creacion de un nuevo tribunal arbitral regional en material de inversiones?*, FORO JURIDICO IBEROAMERICANO, <http://www.forjib.org/Latinoamerica-CIADI> (last visited Jan. 6, 2014).

³⁴ See *id.*

³⁵ THE ICSID CASELOAD STATISTICS 11, INT'L CENT. FOR SETTLEMENT OF INV. DISPUTES (Jan. 2012), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English31>.

³⁶ Nicolas Boeglin, *ICSID and Latin America: Criticisms, Withdrawals and Regional Alternatives*, COMM. FOR THE ABOLITION OF THIRD WORLD DEBT (July 4, 2013), <http://cadtm.org/ICSID-and-Latin-America-criticisms>.

³⁷ See *id.*

³⁸ See Fach, *supra* note 30, at 21–22; see e.g., Hendel, *supra* note 33.

IV. CURRENT ALTERNATIVES AND EFFECTS

As some commentators have noted, leaving the ICSID could result in a decrease in foreign investment because investors want a forum outside a country's courts.³⁹ However, if Argentina denounces the SID convention, it will have some alternatives to the ICSID. In an effort to fight the alleged injustices of the ICSID and the poorly drafted bilateral investment treaties that have harmed Latin America, several countries are working together to create their own regional arbitration tribunals.⁴⁰

On March 11, 2011, Bolivia, Colombia, Ecuador, Peru, Argentina, Brazil, Paraguay, Uruguay, Chile, Guyana, Suriname, and Venezuela formed the Union of South American Nations (UNASUR).⁴¹ One of UNASUR's future goals is to establish an international investment arbitration forum that recognizes the distinct nature of these emerging economies.⁴² Under the proposed arbitration framework, hearings will be held in an official South America language, and the forum will require the exhaustion of local remedies.⁴³ Also, the costs of the arbitration will be spread unevenly among the countries in arbitration (depending on their economic development), documents and hearings will be public, and there will be an appeals system.⁴⁴

In addition to this option, Argentina and other Latin American countries are devising bilateral investment treaties that better balance both parties' interests and that provide arbitration forums—other than the ICSID—to resolve investment disputes.⁴⁵ Given these alternatives to the ICSID, Argentina's withdrawal may not have a significant effect on foreign investment in the country because investors will know that they still have an option besides litigation in Argentine courts.

Moreover, even if these alternatives are not viable by the time Argentina withdraws, the risk of a drop in foreign investment is likely overstated. Statistics have shown that the level of investment in a country is not strongly related to the

³⁹ See Robinson, *supra* note 2.

⁴⁰ See Fach, *supra* note 30, at 32–33.

⁴¹ See Tratado Constitutivo de la Union de Naciones Suramericanas, May 23, 2008, available at <http://www.unasursg.org/uploads/f8/74/f874c8c194f76a8bbd9b2ca6f23a5af7/Tratado-constitutivo-UNASUR.pdf>.

⁴² See Katia Fach Gomez, *Latin American Approaches to International Dispute Resolution*, American Society Of International Law Meeting in Washington (Mar. 25, 2011), http://www.academia.edu/830249/Latin_American_Approaches_to_International_Dispute_Resolution.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See Fach, *supra* note 30, at 38.

arbitration forum. Instead, investment is more closely tied to a country's economic and political stability along with its GDP growth rate.⁴⁶ Brazil is a great example of this phenomenon. It has one of the highest rates of foreign investment in the region, yet it is not part of the SID Convention.⁴⁷ Similarly, Mexico's foreign investment is expected to grow even faster than Brazil's over the next few years, even though Mexico has never been a party to the Convention.⁴⁸

V. CONCLUSION

Given the substantial problems with the current ICSID framework and the large number of cases currently pending against Argentina, denouncing the SID Convention and leaving the ICSID is the best course for the country. Doing so would allow Argentina to use other investment arbitration forums that Latin American countries are currently developing. These forums will likely be better suited to the country's needs. Moreover, even if Argentina does not have an immediate alternative to the ICSID, this would not necessarily mean a precipitous drop in foreign investment. So long as Argentina's fundamentals remain stable, and the country continues to exhibit strong prospects for growth, it likely can withdraw from the SID Convention without serious concern.

⁴⁶ See generally Paul L. Baker, *Who Enters Into Bilateral Investment Treaties and Do They Have an Impact on Foreign Direct Investment?* (July, 2012) (unpublished manuscript), https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=SAEe2012_Job_Market&paper_id=49.

⁴⁷ See Boeglin, *supra* note 36; Kenneth Rapoza, *Sorry Brazil, Investors Prefer Mexico*, FORBES (July 10, 2012, 10:38PM), <http://www.forbes.com/sites/kenrapoza/2012/07/10/sorry-brazil-investors-prefer-mexico/>.

⁴⁸ See *id.*; Boeglin, *supra* note 36.